(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Genicom Corporation	)	EPCRA Appeal No. 92-2
Docket No. CERCLA III-006 & EPCRA III-057	)	

[Decided December 15, 1992]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

GENICOM CORPORATION

EPCRA Appeal No. 92-2

FINAL DECISION

Decided December 15, 1992

Syllabus

Genicom Corporation ("Genicom") has appealed from the assessment of a penalty against it in the amount of $74,812.50 for violations of Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act and Section 304 of the Emergency Planning and Community Right-to-Know Act. The violations arose out of the failure of Genicom to timely notify appropriate governmental response authorities when it discovered two releases of reportable quantities of a hazardous substance, waste cyanide solutions, from its plating operations at Waynesboro, Virginia. Genicom asserts that the Initial Decision of the Presiding Officer from which it appeals was in error in four respects:

(1) The application of the Agency penalty policy in this case was unduly harsh and the penalty policy should not have formed the basis of penalties.

(2) The Presiding Officer failed to consider Genicom's argument that EPCRA notification was not required because there was no off-site risk.

(3) The second release should not have been considered a second violation for penalty purposes since both releases were discovered simultaneously.

(4) Notice to the State Water Control Board could be imputed to the Virginia Emergency Response Council and therefore there was no failure to notify the Council.

Held: The first three bases for appeal are rejected since two distinct violations were involved, no off-site risk need be shown, and the penalty policy was applied appropriately. The final basis is rejected because it was not raised in the proceedings below. A penalty of $74,812.50 is therefore assessed.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

Genicom Corporation ("Genicom") has appealed the Initial Decision of the Presiding Officer, arising out of enforcement actions brought against Genicom by U.S. EPA Region III. These enforcement actions alleged violations of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The CERCLA and EPCRA actions were consolidated below. This appeal is timely filed with the Board pursuant to 40 C.F.R. §22.30(a), 57 *Fed. Reg.* 5326 (February 13, 1992).

The enforcement actions which led to this appeal relate to requirements of CERCLA (§103, 42 U.S.C. §9603) and EPCRA (§304, 42 U.S.C. §11004) which both require certain notifications to be given in the event of a release of a

hazardous substances in amounts exceeding specified quantities. Genicom does not dispute that two releases of hazardous substances occurred but does challenge the finding of the EPCRA violations and the penalty assessment for all the violations. For the reasons discussed below, we conclude that the Presiding Officer's findings and conclusions were well-founded and assess a total penalty of $74,812.50.

I. *BACKGROUND*

Genicom is a corporation which manufactures computer printers and precision electronic relays at its facility in Waynesboro, Virginia. In its operations at the Waynesboro facility, it generates waste cyanide solutions from the plating of metal parts. The spent cyanide solutions are pumped from the plating facility to a storage tank at Genicom's wastewater treatment facility through pipes contained in an underground conduit. At the wastewater treatment plant, the wastewaters are treated and then discharged to the South River pursuant to the company's National Pollutant Discharge Elimination System ("NPDES") permit.[1]

Genicom has admitted that a structural failure in a pipe connecting the plating plant to the wastewater treatment facility led to releases of "substantially untreated" waste cyanide solutions to an effluent channel which then led to the South River.[2] These releases occurred on October 11, 1990, in the amount of 136 pounds of cyanide and October 30, 1990, in the amount of 27.5 pounds.[3] These releases occurred because the leak from the broken pipe allowed waste cyanide solution to escape into a containment area in the wastewater treatment facility, from which the solution went through a drain and was routed through the treatment plant at a time when the plant was not configured to treat cyanide.[4] As a result, a listed hazardous substance, cyanide, was released off-site of Genicom's facility and into the South River.

Genicom had its first indication of a problem when it received on October 30 the results of a laboratory analysis of a sample of its October 11 effluent sent off for routine analysis. The results showed an abnormally high level of cyanide. Genicom asked the laboratory to verify its results and such verification was received on October 31. Also on October 31, Genicom personnel noted a red

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[1] Genicom's Brief in Support of Proposed Findings of Fact and Conclusions of Law, at 2.

[2] This was stipulated to at the hearing (transcript ("Tr.") at 10), and is included in Genicom's proposed Findings of Fact on appeal.

[3] *Id.*

[4] Tr. at 65.

liquid coming from the covered trench in the containment area. This liquid was found to contain cyanide. After an examination of its records, comparing what had been pumped out of the plating room and what had been received at the wastewater treatment plant, the existence and approximate quantities of the two releases were confirmed.[5]

There is no dispute that the amount of the releases exceeded the "reportable quantity" for spent cyanide plating bath solutions, which is 10 pounds.[6] In the case of CERCLA, §103(a) requires that as soon as any person in charge of a facility (or vessel) has knowledge of the release of a hazardous substance in an amount equal to or exceeding a reportable quantity, that person shall immediately notify the National Response Center ("NRC") of such release. In this instance, Genicom notified the National Response Center at 6:00 p.m. on October 31, 1990, of both the October 11 and October 30 releases.[7]

In the case of EPCRA, §304 requires that whenever a notification is required by §103(a) of CERCLA, the owner or operator of the facility shall immediately give notice to "the community emergency coordinator for the local emergency planning committees * * * for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release." For the Waynesboro, Virginia facility, the notice would be required to go to the Virginia Emergency Response Council and the Augusta County Joint Local Emergency Planning Committee. No notice was given to either of these committees,[8] although Genicom argues for the first time on appeal that its notice to the Virginia State Water Control Board pursuant to its NPDES permit should be imputed to the Virginia Emergency Response Council, of which the State Water Control Board is a member, thus satisfying any notification requirement relative to the Council. The notification to the State Water Control Board was made at approximately 4:00 p.m. on October 31, 1990.

In its complaints, the Region sought penalties of $99,500 for the alleged EPCRA violations and $49,750 for the alleged CERCLA violations. At the hearing on the consolidated actions, the Region therefore sought a total penalty of

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[5] Initial Decision at 6-7.

[6] 40 C.F.R. §302.4, Table 302.4 (F007 wastes) for CERCLA, and applied to EPCRA through the definition of reportable quantity at 40 C.F.R. §355.20. However, as discussed later in this opinion, Genicom disputes whether notification under EPCRA was required "because there was no off-site risk to human health." Notice of Appeal, at 1.

[7] Initial Decision at 8.

[8] Initial Decision at 5.

$149,250. After due consideration, the Presiding Officer assessed a penalty in the amount of $74,812.50 based on his application of the applicable Agency penalty policy as discussed below.

In its Notice of Appeal, Genicom raises four instances of alleged error in the Initial Decision. These are:

(1) The application of the Agency penalty policy in this case was unduly harsh and the penalty policy should not have formed the basis of penalties.

(2) The Presiding Officer failed to consider Genicom's argument that EPCRA notification was not required because there was no off-site risk.

(3) The October 30, 1990 release should not have been considered a second violation since the October 11 and 30 releases were discovered simultaneously.

(4) Notice to the State Water Control Board could be imputed to the Virginia Emergency Response Council and therefore there was no failure to notify the Council.

II. *DISCUSSION*

Genicom's first basis for appeal is that the penalty policy should not have been used in determining the appropriate penalties for any violations. The policy used in this case was the "Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act" dated June 13, 1990 ("Penalty Policy"). This policy requires the calculation of a base penalty through a matrix which considers the nature, extent, gravity and circumstances of the violation, and then provides for certain adjustments, based on factors specific to the violator.

In accordance with 40 C.F.R. §22.27(b), a Presiding Officer is required to "consider" any civil penalty guidelines issued for the appropriate statute, but is not required to follow them. *In re 3M Company*, TSCA Appeal No. 90-3, at 19 n.20 (CJO, Feb. 28, 1992). The Presiding Officer followed the penalty policy in

this case, although applying it to arrive at a lower penalty than was assessed in the complaint.

Genicom argues that the use of the penalty policy was inappropriate because it "at all times acted responsibly," prevented additional releases on October 31, notified the NRC, complied with other EPCRA requirements, and notified the State Water Control Board, a member of the Virginia Emergency Response Council. Genicom also argues that, although it did not notify the local emergency planning committee, "neither personnel on-site or off-site were threatened by the releases, and the releases had already occurred and dissipated, foreclosing any potential response actions by the [local emergency planning committee] or [state emergency response commission]." Appellant's Brief in Support of Notice of Appeal at 7.

In support of its position, Genicom's brief contains an extensive discussion of a decision by Chief Administrative Law Judge Frazier in *In the Matter of Thoro Products Company*, Docket No. EPCRA VIII-90-04 (May 19, 1992). Genicom focuses particularly on the following language:

> In assessing each of these three factors -- extent, gravity and circumstances -- the penalty policy and EPA's application of that policy in this case emphasize the need for immediate notification of the release and the potential consequences -- the potential threat to human health and the environment -- absent such immediate notification. I find that the Agency's assessment of these factors bears little relationship to the actual facts in the case and greatly exaggerates the potential consequences -- the potential threat to human health and the environment in the Arvada area -- as a result of Respondent's failure to report.

Thoro Products at 40. This point is discussed later in the opinion where the Presiding Officer states:

> Since the incident was essentially over before the duty to report arose, there was little, if any, potential for emergency personnel, the community and/or the environment to be exposed to hazards as the result of noncompliance with the reporting requirements. While the first responders and emergency managers encountered some real problems, these did not result from the failure to notify after knowledge of the release of an RQ was acquired by Respondent. These problems resulted from the release itself and

> a lack of knowledge about the nature and source of the chlorine cloud.

Thoro Products at 44. Genicom finds this situation analogous to its own since, at the time the obligation to notify arose, the releases had already been diluted by the river to harmless levels. As such, even with timely notification, there was nothing that emergency response officials could, or needed to, do.

We do not find this argument persuasive. In terms of whether the penalty policy should apply, as opposed to how it was applied, we see no reason that it should not apply. The violations here are precisely those contemplated by the policy. The policy reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances.[9] Even Genicom seems to concede that the result it seeks, a substantially lower penalty, could derive from "a proper application of EPA's penalty policy."[10]

Genicom's argument, relying on the language quoted from *Thoro Products*, is that the policy should not apply or that the penalty should be reduced because, by the time the duty to notify arose, "the incident was essentially over." We note that the Presiding Officer in this case specifically rejected this argument, stating that the notification requirement is triggered by knowledge of the release without regard to a person's view of the possible lack of harm. The Presiding Officer then stated that:

> Weighing the seriousness of the violation by the delay in notification, rather than by the harm actually caused by the release in a particular case, ensures that notification will serve its purpose of providing a mechanism whereby the public authorities are notified of every potentially hazardous release as soon as possible, leaving to them the decision of what response is necessary or feasible.

Initial Decision at 12-13.

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[9] As stated by the Agency's Chief Judicial Officer in discussing the Agency's TSCA penalty policy, the policy "facilitate[s] the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provides a sound framework for the exercise of an appellate tribunal's discretion." *In re ALM Corporation*, TSCA Appeal No. 90-4, at 7 (CJO, Oct. 11, 1991). That statement is equally true for the penalty policy at issue here.

[10] Respondent's Brief in Support of Proposed Findings of Fact and Conclusions of Law, at 14, 18.

In the penalty policy, the Agency discusses the purpose of the emergency notification provisions and the potential for harm from violations of those requirements. The potential for harm is measured by both potential for exposure to hazards posed by noncompliance and "the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the CERCLA §103/EPCRA program."[11]

In *Thoro Products*, the Presiding Officer focused exclusively on the potential threat to human health and the environment arising from a lack of immediate notification. *Thoro Products* at 40. There was no discussion of the adverse impact that failure to report has on the statutory purposes of CERCLA and EPCRA. However, we believe this is an important consideration and the failure to recognize this in *Thoro Products* was erroneous.

Immediate notification of an emergency release serves the statutory purpose of alerting public authorities to a potential hazard. Potential hazards are defined in terms of releases of reportable quantities of specified substances. The fact that there may not have been any actual exposure to the hazardous substance does not vitiate the serious adverse effect noncompliance has on this statutory purpose. In addition, the fact that the incident was "essentially over" at the time notification was required does not in any way mitigate the violation. It would seriously weaken the emergency notification provisions if the longer the delay in discovery and notification of a release, and the higher likelihood that any adverse effects had already occurred, the lower the penalty on the grounds that there is nothing left for the public authorities to do at the time of notification.[12]

For all these reasons, we conclude that application of the penalty policy to these violations was appropriate.

Genicom's second basis for appeal was that the Presiding Officer failed to address its argument that EPCRA notification was not required because there was no off-site risk to human health. Genicom argues that Section 304 of EPCRA

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[11] Penalty Policy, at 18.

[12] Under the penalty policy, the gravity and extent factors are used to determine a cell on the matrix for determining the base penalty. Each cell contains a penalty range, with the circumstances of the violation being used to establish a penalty within that range.
One circumstance relates to risk of exposure, with the greater the risk of exposure, the greater the likelihood that the maximum penalty in that range will be assessed. Penalty Policy at 19. In this case, the maximum penalty within the range was assessed because of the substantial delay and even disregard for the notification requirements. Initial Decision at 11-12.

requires notification only if the release poses a potential human health risk to persons off the site of the release. In support of its contention, it notes that notification must be made to any state or local area "likely to be affected by the release." Section 304(b)(1), 42 U.S.C. §11004(b)(1). Genicom also cites the implementing regulation which contains an exemption for "[a]ny release which results in exposure to persons solely within the boundaries of the facility." 40 C.F.R. §355.40(a)(2). Finally, Genicom points to provisions concerning the information to be included in the notifications which refer to health risks and proper precautions, Section 304(b)(2)(F) and (G), 42 U.S.C. §11004(b)(2)(F) and (G).

Genicom reasons that the only off-site exposure was exposure to dissolved cyanide solution downstream of the discharge in the South River. Since the instream concentrations were less than the State's health-based water quality standard for cyanide,[13] there was no risk to human health off-site and EPCRA notification was not required. In other words, absent such a risk, neither the State nor the local area is "likely to be affected by the release."

The Region responds that Genicom's position contradicts the clear and unambiguous requirement for reporting under Section 304. It argues that Section 304 does not speak in terms of off-site risk. In fact, the Region argues that to condition a reporting requirement on a determination of off-site risk would defeat the prophylactic intent of the statute and risk the very injuries the statute was designed to prevent.[14]

We will address each of Genicom's arguments in turn. Section 304(a) provides in pertinent part:

> If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of [CERCLA], the owner or operator of the facility shall

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[13] Genicom has stated, and the Region has not disputed, that it calculated instream concentrations of cyanide in the South River as approximately 0.08 milligrams per liter for the October 11 release and 0.04 milligrams per liter for the October 30 release. Tr. at 60-62. The State water quality standard is 0.7 milligrams per liter. Respondent's Brief in Support of Proposed Findings of Fact and Conclusions of Law, n.3 at 8.

[14] Brief of Complainant-Appellee in Response to Genicom's Notice of Appeal and Brief in Support of Appeal, at 12-15.

> immediately provide notice as described in subsection (b) of this section.

Section 304(a)(1), 42 U.S.C. §11004(a)(1).

Since Section 304(a) refers to releases under Section 103 of CERCLA, it is necessary to first examine the structure of Section 103. (We note that Genicom has not argued that Section 103 requires off-site risk to establish a violation.) Section 103 requires notification for quantities equal to or greater than those determined pursuant to Section 102 ("reportable quantities"). Section 102 requires the Administrator to designate "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and * * * promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title." Section 102(a), 42 U.S.C. §9602(a).

Therefore, Section 102 establishes which substances, and at what levels, present a sufficient danger to warrant reporting. Once these substances and levels are established, there is a clear, unambiguous requirement to notify under Section 103. Relevant risk considerations are dealt with in establishing reportable quantities, not in subsequent decisions on whether releases of reportable quantities should be reported.

Genicom argues that a requirement for actual risk is found in EPCRA Section 304 in the language that requires notification of the State and local agencies "likely to be affected." However, Genicom has provided no support for its position that a State or local area is "likely to be affected" only if off-site risk can be demonstrated.

The "likely to be affected" language originated in an amendment introduced by Senator Lautenberg that ultimately became Section 304 of EPCRA.[15] Senator Lautenberg stated in introducing this proposed amendment:

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[15] A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), S. PRT. 101-120, Volume II at 1036 (1990). The "likely to be affected" language was derived from Senator Lautenberg's proposed amendment to Section 103 of CERCLA, a proposed new Section 103(j), which ultimately became the basis of Section 304 of EPCRA. (EPCRA was developed in conjunction with amendments to Superfund and was included as Title III of the Superfund Amendments and Reauthorization Act of 1986. All references to legislative history relate to Section 304 of EPCRA.)

> These provisions would improve the notification and penalties provisions of the existing Superfund program by requiring immediate notification of State and local officials in the event of a release of a "reportable quantity" of a hazardous substance covered by Superfund.

A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), S. PRT. 101-120, Volume II at 1000 (1990). Senator Lautenberg further stated:

> [T]he amendment would require immediate notification upon the release of a reportable quantity under Superfund. Facilities experiencing such a release would be required to notify the National Response Center, as provided under current law, but also would have to notify the appropriate emergency planning committees, their Governor, and in the absence of planning committees, State and local emergency response officials.

Id. at 1037. Thus, Senator Lautenberg envisioned his amendment as requiring notice to State and local officials of *any* reportable release under Superfund. Senator Lautenberg saw the purposes of this notification to extend beyond response to the immediate emergency, to include such things as tracking patterns of releases and aiding in designating facilities for emergency planning.[16]

As described by Senator Lautenberg, his amendment was intended to require that any facility with a reportable release would have to "notify the National Response Center, as provided under current law, but also would have to notify

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[16] In describing the purpose of his proposed amendment to Superfund to extend notification to State and local response officials, in what ultimately formed the basis for Section 304, Senator Lautenberg said:

> This notification requirement simply expands upon a provision I authored in S. 51. [These] requirements are expected to provide a means for the local planning committees, the Governor, and the National Response Center to track facilities that may have a record of releases, and should serve as an aid in designating additional facilities to participate in community emergency planning. These notification requirements are effective immediately upon enactment of the Superfund Improvement Act of 1985.

A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), S. PRT. 101-120, Volume II at 1038 (1990). Thus, Senator Lautenberg clearly envisioned local planning and other benefits which go beyond those dealing with the immediate response to the particular release.

[appropriate state and local officials]." This intended parallelism between the EPCRA Section 304 obligation to notify State and local agencies and the CERCLA Section 103 obligation to notify the Federal government would not exist if an evaluation of potential risk were permissible before notifying a State or local agency when such an analysis is not permissible before notifying the Federal government. Further, a misjudgment as to potential risk could have serious environmental consequences and not reporting all releases could undercut the value of Section 304 in support of the emergency planning aspects of EPCRA. There is no reason to read Section 304 as Genicom suggests when the legislative history of EPCRA makes clear that the purpose of the amendment was to require notification to State and local agencies of *any* release requiring notification to the Federal government.[17]

Having determined that there is an obligation to notify States and localities "likely to be affected" by any reportable release, we recognize that the scope of the notification may vary depending upon the extent and nature of the release. For example, in certain circumstances many jurisdictions may be potentially affected. However, if the obligation to notify means anything, it must at a minimum extend to at least the State and the locality where the release first enters the environment off-site of the facility. Here, as noted, that would mean notice to the State of Virginia and Augusta County.

Genicom's reliance on the exception for releases resulting in exposure to persons solely within the facility is also misplaced. Indeed, contrary to Genicom's position, the Agency expressly rejected the notion that there must be off-site exposure and risk before the notice requirement is triggered. The Agency's response to comment on the proposed implementing regulations for EPCRA dealing with the exemption cited by Genicom explained a change in language used in the final rule from that contained in the proposal. The Agency stated in the preamble to the final regulations that:

> The phrase "results in exposure to persons solely within the boundaries of the facility" was substituted for "results in exposure to persons outside the boundaries of the facility." Thus, releases need not result in *actual* exposure to persons off-site in order to be subject to the release reporting requirements.

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[17] *Id*. at 1000 and 1037.

52 Fed. Reg. 13380-81 (April 22, 1987). This change was made to conform this exemption to the language of the statute, which provides at Section 304(a)(4), 42 U.S.C. §11004(a)(4), that Section 304 does not apply "to any release which results in exposure to persons solely within the site or sites on which a facility is located."

Requiring proof of off-site risk would also be contrary to the legislative history, which explained that the subject language provides that "for a release to be reportable under this section it must extend beyond the site on which the facility is located. On-site releases that do not extend off-site are exempt from the requirements."[18] Thus, all this provision means is that if the release does not extend off-site, and thus the only persons potentially exposed were on-site, the reporting requirement does not apply. This neither imposes nor suggests any requirement for either actual exposure or risk for releases which go beyond the boundaries of the facility.

Finally, Genicom argues that the language in Section 304(b) which describes the contents of the notice to be given under Section 304(a), demonstrates that without an off-site risk, no notice is required. It is true, as Genicom indicates, that the notification must include information about "any known or anticipated acute or chronic health effects" associated with the release (Section 304(b)(2)(F)) and "proper precautions to take as a result of the release" (Section 304(b)(2)(G)). However, the notice also includes much broader information about the release, such as the name of the chemical substance; the quantity, time and duration of the release; and the medium or media into which the release occurred (Sections 304(b)(2)(A) and (C)-(E)). While it is certainly logical that any notice include information about health effects (if there were any), Genicom has presented no argument as to why this language should be read as limiting the obligation to provide notification of any release reportable under Section 103 of CERCLA.[19]

We conclude that Section 304(a) requirement does not require that actual exposure to harmful levels of a hazardous substance must be shown to establish an EPCRA reporting violation. Under EPCRA Section 304(a), once the facility owner or operator has knowledge of a release of a reportable quantity of a hazardous substance from the facility, the obligation to notify is triggered without further consideration of risk.

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[18] Conference Report 99-962, Superfund Amendments and Reauthorization Act of 1986, 132 Cong. Rec. H9113-14 (Oct. 3, 1986).

[19] The information required would be valuable, even absent actual exposure or risk, for the purposes intended by Senator Lautenberg. See note 16, *supra*.

Accordingly, we find that the Presiding Officer's determination that EPCRA reporting was required was correct. [20] Even if we were to conclude that the Presiding Officer was in error in not explicitly discussing this issue in the Initial Decision, as Genicom has alleged, it would be at worst harmless error and would not affect the determination of liability or the assessment of the penalty.

Genicom's third basis for appeal was that the October 30, 1990 release should not have been considered a separate violation for penalty policy purposes since the October 11 and October 30 releases were discovered simultaneously. Genicom argues that "[t]here was clearly no knowledge on the part of Genicom which could have been used to prevent the second release since both were discovered simultaneously." [21]

However, the violation of CERCLA §103/EPCRA §304 relates to the failure to notify, not the failure to prevent a second occurrence. As noted in the Initial Decision, CERCLA and EPCRA impose an obligation to report "any release" and "a release," respectively. Clearly, the October 11 and October 30 releases were distinct releases. As the Presiding Officer noted:

> Speaking in the singular, as they do, the requirements are properly construed as placing a separate obligation, subject to its own penalty, to report each release, since each release will have its own data with respect to time, place, quantities, circumstances etc.

Initial Decision at 13. We find this reasoning persuasive and find that it was appropriate to assess a separate penalty for each violation. [22]

Finally, Genicom argues that it did not violate Section 304(a) by failing to notify the Virginia Emergency Response Council because its notice to the State Water Control Board could be imputed to the Council. Region III has objected to

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[20] In this respect, we believe that Administrative Law Judge Yost's Order on Motion in Holly Farm Foods, Inc., Docket No. EPCRA-III-059 and CERCLA-III-0057, finding that Section 304(a) requires evidence of some exposure to humans, was wrongly decided.

[21] Appellant's Brief in Support of Notice of Appeal, at 10-11.

[22] We note that the Presiding Officer did consider the simultaneous discovery of the two violations in rejecting the complainant's proposed assessment of treble damages for the second violation. He stated that there was no greater fault as to the second violation since it was discovered and reported at the same time as the first. "Triple
penalties for a second violation make sense when a person after having failed to report a release it knew about repeats the same violation." In the facts of this case however, he determined that they would be merely punitive and not serve as an added deterrent. Initial Decision at 14.

Genicom's raising this issue because Genicom has not previously raised this argument. Region III has filed a Motion to Strike this argument, citing 40 C.F.R. §22.30(c), which provides in part that "the appeal of the initial decision shall be limited to those issues raised by the parties during the course of the proceeding."[23]

Genicom has filed a response to this motion. In this response, it asserts that the issue was raised below by Government Exhibit 10 and the Presiding Officer's reference at page 15 and footnote 31 of the Initial Decision.[24]

Government Exhibit 10 is simply a letter from the Virginia Emergency Response Council to Region III confirming that they had not received notifications of either release. The only reference to the State Water Control Board is in the listing of agencies on the letterhead. On page 15 of the Initial Decision, the Presiding Officer indicates that while Genicom failed to notify the designated State and local emergency response committees, it did notify the Water Control Board and cites this as one of the factors justifying a downward adjustment to the penalty. He states in footnote 31 that "[i]t is to be noted that the SWCB is a member of the Virginia Emergency Response Council."

We do not believe that these two references, neither of which were raised by Genicom, constituted a raising of the issue Genicom now argues on appeal. Nowhere in the record prior to appeal does Genicom argue that its notice to the Water Control Board should be imputed to the Council. Appellee's motion is well-founded and is hereby granted.[25]

III. *CONCLUSION*

We conclude that the penalty assessed by the Presiding Officer was proper and appropriate. Therefore, we assess a penalty in the amount of $74,812.50, for the reasons discussed in the Initial Decision.

Respondent shall pay the full amount of the penalty within thirty (30) days of the effective date of this final order. Payment shall be made by cashier's or

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[23] Brief of Complainant-Appellee in Response to Genicom's Notice of Appeal and Brief in Support of Appeal, at 26-27.

[24] Appellant's Response to the Appellee's Motion to Strike and Supporting Memorandum.

[25] Not only was this issue not previously raised but also we note that Genicom actually stipulated that it did not notify the Virginia Emergency Response Council. Tr. at 11.

certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region III
(Regional Hearing Clerk)
P.O. Box 360515M
Pittsburgh, PA 15251

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Final Decision in the matter of Genicom Corporation, EPCRA Appeal No. 92-2, were sent to the following persons in the manner indicated:

Certified Mail,
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Dated: _____

Mildred T. Connelly
Secretary

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Genicom Corporation	)	EPCRA Appeal No. 92-2
Docket No. CERCLA III-006 & EPCRA III-057	)	

CERTIFICATION SHEET

The Environmental Appeals Board hereby certifies that the attached *Final Decision* in the above-referenced matter accurately reflects the opinion of the Board.

_____ _____
Nancy B. Firestone — Date
Environmental Appeals Judge

_____ _____
Ronald L. McCallum — Date
Environmental Appeals Judge

_____ _____
Edward E. Reich — Date
Environmental Appeals Judge